ATTORNEY FOR APPELLANT:

JUAN GARCIA, JR.
Garcia & Crawford, LLC
Elkhart, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GEORGE P. SHERMAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ANESSA B. BENNETT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0709-CR-435
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0504-FA-70

May 20, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Anessa B. Bennett (Bennett), appeals her conviction for possession of methamphetamine weighing three grams or more with intent to deliver, a Class A felony, Ind. Code § 35-48-4-1.

We affirm.

ISSUES

Bennett raises two issues on appeal which we restate as follows:

(1) Whether the State presented sufficient evidence to support her conviction beyond a reasonable doubt; and

(2) Whether the trial court properly sentenced Bennett.

FACTS AND PROCEDURAL HISTORY

On December 13, 2004, Officer Jose Miller of the Goshen Police Department (Officer Miller) conducted a controlled buy for methamphetamine between a confidential informant and Joseph Brown (Brown) at a residence in Glenwood Avenue in Goshen. After the deal was completed, Officer Miller field-tested the substance Brown had delivered and confirmed it was methamphetamine, weighing approximately 8.5 grams. In researching the information on the residence to get the search warrant for the home, it was determined that the residence belonged to Bennett and her husband, Raymond Bennett (Raymond) (collectively, the Bennetts).

The search warrant was executed the next day. Inside the residence, the Officers found five individuals: Brown, his girlfriend, and Bennett's three minor children. The

Bennetts were not at home at the time of the execution of the search warrant; they were on a cruise that began on December 12 and had left the evening of December 10 for Michigan to await their flight to Florida. Brown, a friend of Bennett's, was asked to care for her children while they were on the cruise.

During their search of the garage's attic, the Officers found a surveillance camera directed at the driveway and connected to a television in the garage. The Bennetts' bedroom door was locked. After gaining entrance to the master bedroom, the Officers found a large clear plastic baggy containing a large amount of a powdery substance underneath the bed. On a stand, they found pieces of paper with names and numbers written on them. Underneath the papers, they noticed a clear plastic bag, containing a white powdery substance, later identified as methamphetamine, weighing 1.72 grams. Also, a wicker basket standing on a shelf on the same stand contained either a white powdery substance or a white powdery residue. In a drawer underneath the shelf, the Officers found clear plastic baggies, some of them containing a white powdery substance. One of the baggies was tested and found to contain methamphetamine. An electronic scale, foil, and a glass tube with burnt residue on it were also in the drawer. A plastic bag found in the drawer held three clear plastic baggies, each containing amphetamine with a combined weight of 10.54 grams.

A search of the garage revealed more methamphetamine. Inside a locked cabinet, the Officers found a plastic container that held several clear plastic baggies with a white powdery substance. The largest bag tested positive for methamphetamine and weighed 24.28 grams. There were nine smaller bags which had a combined weight of 30.22 grams. The substances

in two of the smaller bags were tested and found to be methamphetamine. Another container in the cabinet contained plastic tubes with white powdery residue on the ends of the tubes. A second cabinet in the garage, when opened, held U.S. currency and four clear plastic bags, each containing a white powdery substance. Each of the plastic bags weighed more than 3 grams. The substance in two of the plastic bags was tested and found to be methamphetamine. A tool case with Raymond's name on it held tin foil, several clear plastic bags, and a bag of rubber bands. The Officers also found an electronic scale and a Nescafe container on a workbench. Opening the container, the Officers discovered it contained hollow pin tubes with a white powdery substance and other paraphernalia. A small spiral bound notebook held two bags, one containing a white powdery substance and the other containing a powdery residue.

On April 22, 2005, the State filed an Information, charging Bennett with possession of methamphetamine weighing three grams or more with intent to deliver, a Class A felony, I.C. § 35-48-14-1. On July 16 through July 17, 2007, a jury trial was held. At the close of the evidence, the jury found Bennett guilty as charged. On August 9, 2007, after a sentencing hearing, the trial court sentenced Bennett to thirty-five years of imprisonment, with two years suspended.

Bennett now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sufficiency*

First, Bennett argues that the State failed to prove beyond a reasonable doubt that she possessed methamphetamine with intent to deliver. Specifically, she asserts that the State failed to prove that (1) she knowingly possessed the methamphetamine and (2) she intended to deliver it.

Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id*. at 213. A conviction may be based upon circumstantial evidence alone. *Id*. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id*.

In order to convict Bennett of possession of methamphetamine weighing three grams or more with intent to deliver as a Class A felony, the State was required to prove beyond a reasonable doubt that she knowingly or intentionally possessed the methamphetamine, which weighed more than three grams, and intended to deliver it.

A. *Constructive Possession*

Possession of contraband may be either actual or constructive. *Gee v. State*, 810 N.E.2d 338, 340 (Ind. 2004). Actual possession occurs when a person has direct physical control over the item. *Id*. Here, the parties agree that Bennett did not have actual possession of the methamphetamine. Therefore, to establish constructive possession, the State must show that the defendant had both the intent and the capability to maintain dominion and control over the contraband. *Id*. Proof of a possessory interest in the premises on which the contraband is found is adequate to show the capability to maintain dominion and control over the item. *Id*. However, in the instant case, Bennett was no longer in exclusive possession of the premises as she and Raymond had left three days prior for a cruise. Instead, Brown was staying in the house, caring for Bennett's minor children.

When possession of the premises is not exclusive, as in this case, then the inference of intent to maintain dominion and control over the methamphetamine must be supported by additional circumstances pointing to the defendant's knowledge of the nature of the controlled substances and their presence. *Id*. The additional circumstances have been shown by various means: (1) incriminating statements made by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (4) proximity of the contraband to the defendant, (5) location of the contraband within the defendant's plain view, and (6) the mingling of the contraband with other items owned by the defendant. *Id*. at 341. In each of these instances "there exists the

probability that the presence and character of the contraband was noticed by the defendant." *Goffinet v. State*, 775 N.e.2d 1227, 1230 (Ind. Ct. App. 2002).

The evidence favorable to the jury's verdict established that Bennett acknowledged that she lived in the house that the Officers searched and that she slept in the master bedroom. The majority of the methamphetamine that was discovered in the residence was found in the locked master bedroom and in locked containers in the Bennetts' garage. Inside the master bedroom, the officers also found, besides the methamphetamine, mail addressed to Bennett and to Raymond. At trial, Brown, a known drug user and dealer, denied bringing any contraband into the residence. He testified that he had not entered the master bedroom or opened any of the locked containers in the garage.

Faced with these facts, the jury found Brown's testimony credible as they found Bennett guilty as charged. Second, Brown himself testified that he smoked methamphetamine with the Bennetts on a regular basis. As Brown's testimony established that the Bennetts were users themselves, it was not unreasonable for the jury to infer, from the totality of the evidence, that the contraband found in the Bennetts' residence properly belonged to the Bennetts.

B. *Intent to Deliver*

Intent to deliver for the purpose of I.C. § 35-48-4-1 can only be established by considering the behavior of the relevant actor, the surrounding circumstances, and the reasonable inferences to be drawn from them. *Dandridge v. State*, 810 N.E.2d 746, 750 (Ind. Ct. App. 2004), *trans. denied* (citing *Davis v. State*, 791 N.E.2d 266, 270 (Ind. Ct. App.

2003), *reh'g denied, trans. denied*). "Possessing a large amount of a narcotic substance is circumstantial evidence of intent to deliver. The more narcotics a person possesses, the stronger the inference that he intended to deliver it and not consume it personally." *Davis*, 791 N.E.2d at 270 (citing *Love v. State*, 741 N.E.2d 789, 792 (Ind. Ct. App. 2001)).

In the instant case, the Officers discovered methamphetamine in two main areas in the Bennetts' residence. In the locked master bedroom, on a stand underneath papers, they found a clear plastic bag which contained methamphetamine and which weighed 1.72 grams. In the stand's drawer, the Officers found clear plastic baggies, some of them containing a white powdery substance. One of the baggies was tested and found to contain methamphetamine, with a weight of 0.83 grams. An electronic scale, foil, and a glass tube with burnt residue on it were also located in the drawer. A plastic container in the drawer held three clear plastic baggies, each containing amphetamine with a combined weight of 10.54 grams.

In the garage, the Officers located even more methamphetamine. Inside a locked cabinet, they discovered a plastic container that held several clear plastic baggies with a white powdery substance. The largest bag tested positive for methamphetamine and weighed 24.28 grams. Nine smaller bags had a combined weight of 30.22 grams. The substances in two of the smaller bags were tested and were found to be methamphetamine. Another container in the cabinet contained plastic tubes with white powdery residue on the ends of the tubes. A second cabinet in the garage, when opened, held U.S. currency and four clear plastic bags, weighing more than 3 grams each. The substance in two of the plastic bags was tested and found to be methamphetamine.

At trial, Lieutenant Shawn Turner of the Goshen Police Department (Officer Turner) testified that the scales found in the Bennetts' home are indicative of a drug dealer because a "hard core user would never leave that much drug on the scale." (Tr. p. 260). Additionally, he informed the jury that the papers listing names and numbers that were found in the Bennetts' bedroom are consistent with the fact that drug dealers often keep ledgers, tracking their customers' usage and debt.

Based on the large amount of methamphetamine—well beyond the statutorily required three grams—found in the Bennetts' home and Officer Turner's testimony, the jury could reasonably infer that the methamphetamine was not solely for personal use but instead was intended to be sold to other users. In sum, we conclude that there is substantial evidence of probative value to support the jury's verdict. *See Perez*, 872 N.E.2d at 213.

III. *Sentencing*

Next, Bennett disputes the trial court's imposition of an aggravated sentence, *i.e.*, thirty-five years of imprisonment, with two years suspended.[1] Sentencing decisions are within the trial court's discretion and will be reversed only for an abuse of discretion. *Matshazi v. State*, 804 N.E.2d 1232, 1237 (Ind. Ct. App. 2004), *trans. denied*. The trial court must determine which aggravating and mitigating circumstances to consider when increasing or reducing a sentence and is responsible for determining the weight to accord these circumstances. *Id*. When a defendant is sentenced to a term of imprisonment that is greater than the presumptive sentence, this court will examine the record to ensure that the trial court

explained its reasons for selecting the sentence it imposed. *Id*. In particular, the sentencing court's statement of reasons must include: (1) an identification of the significant aggravating and mitigating circumstances; (2) specific facts and reasons that led the court to find the existence of such circumstances; and (3) an articulation demonstrating that the mitigating and aggravating circumstances have been evaluated and balanced in determining the sentence. *Bacher v. State*, 722 N.E.2d 799, 801 (Ind. 2000).

A. *Blakely Rights*

As an initial matter, we note that the trial court's finding of aggravating circumstances violated Bennett's rights under *Blakely v. Washington*, 542 U.S. 296, 124 C. St. 2531 (2004). In *Blakely*, the United States Supreme Court stated, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely*, 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U .S. 466, 490 (2000)). "Under *Blakely*, a trial court may not enhance a sentence based on additional facts, unless those facts are either (1) a prior conviction; (2) facts found by a jury beyond a reasonable doubt; (3) facts admitted by the defendant; or (4) facts found by the sentencing judge after the defendant has waived *Apprendi* rights and consented to judicial factfinding." *Robertson v. State*, 871 N.E.2d 280, 286 (Ind. 2007).

The presumptive sentence for a Class A felony is thirty years, with not more than twenty years added for aggravating circumstances or not more than ten years subtracted for

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[1] As the offenses of which Bennett was convicted occurred before the new Indiana sentencing statutes became

mitigating circumstances. I.C. § 35-50-2-4 (2004). Here, the trial court imposed an aggravated sentence of thirty-three years executed, with two years suspended. In support of its sentence, the trial court found the following three aggravators: (1) Bennett's criminal history consisting of four prior misdemeanor convictions (2) Bennett's inability to abide by Indiana's laws and (3) Bennett permitted a drug user to babysit her children. The trial court found as a mitigator: "all mitigators mentioned by counsel for [Bennett]." (Appellant's App. p. 11). The trial court added that weighing the aggravators and mitigators, any aggravator "taken individually substantially outweigh[s] the mitigating circumstances warranting the imposition of a five (5) year enhanced sentence." (Appellant's App. p. 11).

We find that, with the exception of the first aggravator, all other aggravators are invalid under *Blakely*. None of these aggravators were submitted to the jury, and during the sentencing hearing, Bennett did not admit to them or consented to judicial fact-finding. Accordingly, one valid aggravator—Bennett's criminal history—remains. In light of the trial court's statement that a single valid aggravator warrants the imposition of an aggravated sentence, we can say with confidence that the sentence would stand if remanded for re-sentencing. *See Means v. State*, 807 N.E.2d 776, 788 (Ind. Ct. App. 2004).

B. *Imposition of an Aggravated Sentence*

Next, Bennett contends that her sentence is inappropriate in light of the nature of the offense and character of the offender. Pursuant to Appellate Rule 7(B), we may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find

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effective in April 2005, we will apply the presumptive sentencing scheme.

that the sentence is inappropriate in light of the nature of the offense and character of the offender. Sentence review under Appellate Rule 7(B) is very deferential to the trial court's decision and we refrain from merely substituting our judgment for that of the trial court. *Felder v. State*, 870 N.E.2d 554, 559 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. *Id*.

Initially, Bennett contends that in light of *Combs v. State*, 851 N.E.2d 1053, 1061 (Ind. Ct. App. 2006), *trans. denied*, our review under Ind. Appellate Rule 7(B) is limited "to those considerations that are permitted under *Blakely*, that have been proved beyond a reasonable doubt or that have been admitted by the defendant." We disagree and find the dissent in *Combs* to be more pertinent. The dissent clearly establishes that a 7(B) review "is more expansive and may consider more than simply a 're-look' at the appropriate aggravators and mitigators." *Id*. at 1064. As Article VII, Section 6 of the Indiana Constitution authorizes independent appellate review, our review under 7(B) is not constrained by using only *Blakely* aggravators. *Id*. at 1065.

With regard to the nature of the crime, we were struck by the enormous amount of methamphetamine found in the Bennetts' residence. The total amount was well beyond the statutory required minimum of three grams for a Class A felony. The ledgers and notes found in the residence indicate that she was dealing methamphetamine out of a home where minor children were present.

Considering Bennett's character, we first mention her minor criminal history consisting of four misdemeanor convictions: illegal consumption of an alcoholic beverage in

1994; operating a vehicle under the influence in 2000 and operating a vehicle with a blood alcohol content of .10 or greater in 2002. She incurred her fourth misdemeanor conviction—operating while intoxicated—in November of 2005, while on bond in the instant case. Second, even though the largest amount of methamphetamine was locked in containers, we note that some contraband was left out in the open in a residence where minor children live. Moreover, while Bennett and her husband were on a cruise, the children were left at home under the supervision of another drug abuser. Based on the totality of the facts, we find that an aggravated sentence of thirty-five years with two years suspended is appropriate in light of Bennett's character and nature of her offense.

CONCLUSION

Based on the foregoing, we conclude that (1) the State presented sufficient evidence to support Bennett's conviction beyond a reasonable doubt; and (2) the trial court properly sentenced Bennett.

Affirmed.

BAKER, C.J., and ROBB, J., concur.